

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 98-0447**  
**SALES AND USE TAX**  
**FOR TAX PERIODS: 1994-1996**

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**1. Sales and Use Tax:** Contract to Furnish and Install

**Authority:** IC 6-8.1-5-1, IC 6-2.5-2-1 (b), 45 IAC 2.2-4-22 (d).

Taxpayer protests the imposition of tax on the transfer of precast concrete.

**2. Sales and Use Tax:** Change Orders

**Authority:** IC 6-2.5-2-1 (b), 45 IAC 2.2-4-22 (d).

Taxpayer protests the imposition of tax on certain change orders.

**3. Tax Administration:** Penalty

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2(b).

Taxpayer protests the imposition of the penalty.

**Statement of Facts**

Taxpayer is an out of state corporation which serves as a general contractor on construction jobs. Additional sales and use tax, interest and penalty was assessed after a routine audit. Taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

**1. Sales and Use Tax:. Contract to Furnish and Install**

**Discussion**

In September and October, 1994, Taxpayer paid a subcontractor for precast concrete. The subcontractor was also paid to install the precast concrete on Taxpayer's job. After fabrication of the precast concrete, the subcontractor invoiced Taxpayer for the material portion of the job and stored the precast concrete for Taxpayer. Tax was assessed against these invoices as sales of tangible personal property. Taxpayer contends that this transaction should not be considered a sale of tangible personal property, since all material in this instance was transferred pursuant to an agreement to furnish and install the precast concrete.

The presumption is that all Indiana Department of Revenue tax assessments are accurate. Taxpayers bear the burden of proving that an assessment is incorrect. IC 6-8.1-5-1.

IC 6-2.5-3-2 (c) imposes the use tax in construction cases as follows:

The use tax is imposed on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located. However, the use tax does not apply to additions of tangible personal property described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the sale or use of that property; or
- (2) the ultimate purchaser or recipient of that property would have been exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

This law concerning the gross retail tax liability of contractors is explained at 45 IAC 2.2-4-26 as follows:

- (a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.
- (b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate

transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

The issue to be determined is whether the precast concrete were transferred pursuant to a contract to furnish and install and qualify for exemption pursuant to paragraph "a" of the regulation or if the precast concrete were sold separately and subject to gross retail tax pursuant to paragraph "b" of the regulation.

The evidence indicates that the subcontractor produced the precast concrete, issued bills for the preparation of the precast concrete, received payment for the precast concrete and transferred title of the precast concrete to Taxpayer on September 20, 1994 and October 24, 1994. Taxpayer also provided a statement from the subcontractor stating that the subcontractor can produce the pieces of concrete faster than the erector can install the precast concrete. Therefore the subcontractor bills for the materials with "a conditional bill of sale which gives the customer title to the panels once payment had been received." Taxpayer paid for the tangible personal property immediately after it was produced and paid for the services after completion of the services. Taxpayer also provided a "Progress Statement" which shows that the material was separately listed from the service of engineering, erection services and delivery.

Taxpayer, however, argues that the tangible personal property was transferred as part of a contract to furnish and install tangible personal property, the precast concrete. Taxpayer bases its argument that the transfer was made pursuant to a contractual agreement to make an improvement to realty on a contract submitted to the Indiana Department of Revenue prior to the hearing. The contract states on page 6 that the subcontractor will "Furnish all labor, material, tools, equipment and supervision necessary to provide all precast concrete work in accordance with (architect's) plans." The contract called for the sale of the prefabricated concrete and services of installation for one price. The transfer of the property was made pursuant to the contract to furnish and install which indicates that it was sold for one price with a partial payment of the total price made at the time of the transfer of title to the precast concrete to Taxpayer.

### **Finding**

Taxpayer's protest is sustained.

## **2. Sales and Use Tax: Change Orders**

### **Discussion**

Taxpayer's second point of protest concerns the assessment of gross retail tax on certain electrical change orders. The electrical subcontractor paid Indiana sales tax on the materials it used in executing the change orders for Taxpayer. These change orders were invoiced on a time and material basis. Indiana imposes a state gross retail tax on "retail transactions made in Indiana." The payment and collection of the gross retail tax is explained at IC 6-2.5-2-1 (b) as follows:

The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The law concerning installation of tangible personal property is explained for at 45 IAC 2.2-4-22 (d) as follows:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

- (1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax).

Pursuant to the law and regulation, Taxpayer clearly owed sales tax on the tangible personal property used in the construction. The tax should have been collected and remitted by the electrical contractor. The fact that the contractor mistakenly paid Indiana sales tax on the electrical supplies when it purchased the materials for the change orders does not change the fact that the contractor should have collected Indiana sales tax from Taxpayer pursuant to the time and materials contract.

### **Finding**

Taxpayer's protest is denied.

### **3. Tax Administration: Penalty**

#### **Discussion**

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

The rules concerning the payment of tax on a time and materials contract are clear and easily accessible in Indiana Department of Revenue publications. Taxpayer's failure to read and follow these instructions constitutes negligence.

**Finding**

Taxpayer's final point of protest is denied.

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